

- (1) The nature and extent of claimant's injury and/or disability.
- (2) Whether the Administrative Law Judge erred in deducting social security disability payments from claimant's final award under K.S.A. 44-501(h).

- (3) Whether K.S.A. 44-501(h) is unconstitutional as written.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

The Appeals Board will first address claimant's contention that K.S.A. 44-501(h) is unconstitutional. This issue was previously raised and addressed in the Appeals Board decision of Leva Bohanan v. U.S.D. 260, Docket No. 190,281 (November 1995). In its opinion issued November 14, 1995, the Appeals Board held that it is not a court of proper jurisdiction to decide the constitutionality of laws in the state of Kansas. A statute is presumed constitutional. Baker v. List and Clark Construction Co., 222 Kan. 127, 563 P.2d 431 (1977). The Appeals Board shall apply K.S.A. 44-501(h) as written until instructed otherwise by a court of competent jurisdiction.

With regard to the nature and extent of claimant's injury and/or disability, the Appeals Board finds that the Award of the Administrative Law Judge sets out in detail the proper findings of fact and conclusions of law and it not necessary to repeat same herein. The findings and conclusions enumerated in the Award of the Administrative Law Judge are both accurate and appropriate and the Appeals Board adopts same as its own findings and conclusions as if specifically set forth herein as to the issues raised. In awarding claimant a 19 percent functional impairment through her last day worked followed thereafter by a 50 percent work disability, the Administrative Law Judge has properly applied the reasoning in both Lee v. Boeing Co., 21 Kan App. 2d 365, 899 P.2d 516 (1995) and Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990). The Administrative Law Judge properly rejected Dr. Ernest R. Schlachter's gratuitous opinion regarding claimant's inability to be trained to return to work, finding it to be an inappropriate opinion regarding claimant's task loss. The finding that claimant has suffered a 100 percent wage loss as a result of her injuries is supported by the evidence and the Appeals Board adopts that opinion as its own.

The Appeals Board must next consider the Administrative Law Judge's allowance of a credit against both claimant's retirement benefits received through her company and the social security income received as a result of her injuries.

K.S.A. 44-501(h) allows a reduction of the weekly benefit equivalent of the total amount of any "retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made"

The Administrative Law Judge granted a 100 percent credit for not only the retirement benefits received from the claimant's employer, which all parties agree is appropriate, but also for the weekly value of the social security income received as a disability payment. The language of the statute allows a reduction in benefits received as "retirement benefits under the federal social security act." There is no language in the statute which allows an offset for social security "disability" benefits and the two are not synonymous. As such, the Appeals Board finds the credit granted by the Administrative Law Judge for the social security disability benefits is improper and the Award is reversed as to that finding.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as the additional findings not discussed herein are not in contravention to the findings stated herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated February 21, 1996, shall be, and is, affirmed in part and reversed in part and claimant is granted an award against the respondent, R. L. Polk & Company, and its insurance carrier, Transportation Insurance Company, for 4 weeks temporary total disability compensation at the rate of \$313 per week in the amount of \$1,252.00 followed by 49.57 weeks permanent partial disability at the unreduced rate of \$313.00 per week in the amount of \$15,515.41 followed thereafter by 157.93 weeks permanent partial disability at the reduced rate of \$166.46 per week in the amount of \$26,289.03 for a total award of \$43,056.44, based upon a 19 percent functional disability converted to a 50 percent whole body work disability.

As of June 20, 1996, there would be due and owing 4 weeks temporary total disability compensation at the rate of \$313.00 per week in the amount of \$1,252.00 followed by 49.57 weeks permanent partial general body disability at the unreduced rate of \$313.00 per week in the amount of \$15,515.41 followed thereafter by 72.29 weeks permanent partial general body disability at the reduced rate of \$166.46 per week in the amount of \$12,033.39 for a total due and owing of \$28,800.80 which is ordered paid in one lump sum minus amounts previously paid. Thereafter claimant is entitled to 85.64 weeks permanent partial general body disability at the reduced rate of \$166.46 per week in the amount of \$14,255.64 until fully paid or until further order of the Director. These computations do take into consideration the retirement benefits received from claimant's employer in the amount of \$146.54 per week effective February 1, 1995 when claimant's retirement benefits with respondent began.

Claimant is further entitled to medical expenses, unauthorized medical and future medical per the award of the Administrative Law Judge.

The attorney fee contract is approved insofar as it is not in contravention to K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

ALEXANDER REPORTING COMPANY

Deposition of Michael Roy Dated March 22, 1995	\$ 181.20
Deposition of Janet Curtis Dated November 16, 1995	\$ 263.20
Total	\$ 444.40

IRELAND COURT REPORTING, INC.

VALERIE GADBERRY

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DOCKET NO. 193,516

Deposition of Jerry D. Hardin \$ 111.50
Dated July 25, 1995

Deposition of Dr. Ernest Schlachter \$ 112.70
Dated July 25, 1995

Total \$ 224.20

BARBER & ASSOCIATES

Deposition of Dr. Robert Eyster \$ 140.00
Dated September 14, 1995

OWENS, BRAKE, COWAN & ASSOCIATES

Regular Hearing Transcript \$ 190.70
Dated October 25, 1995

METROPOLITAN COURT REPORTERS, INC.

Deposition of Michael Dreiling \$ 233.70
Dated January 12, 1996

IT IS SO ORDERED.

Dated this ____ day of July 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: W. Walter Craig, Wichita, KS
Christopher J. McCurdy, Wichita, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director